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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-1351

EDWARD W. BABIC,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

EDWARD W. BABIC, the petitioner herein, prays that a Writ of Certicrari be issued to review the Judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on January 31, 1980.

OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals is not reported. It is printed and attached hereto as Appendix A. The opinion affirms the trial court verdict of guilty of one count of conspiracy to defraud the Internal Revenue Service (IRS), 18 U.S.C. §371; and one count of aiding and assisting the preparation and presentation of fradulent documents to the IRS, 26 U.S.C. §7206(2). Judgment of guilty was entered by the District Court for the Central District of California on December 6, 1978.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on January 31, 1980. Petitioner filed a Motion to Stay Issuance of Mandate pending application for Writ of Certiorari and to continue defendant on bail February 19, 1980. The Motion was granted by the Court of Appeals on February 22, 1980. The jurisdiction of the Supreme Court is based on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether refinement and amplification by this Court of the reliability test set forth in Dutton v. Evans is necessary to preserve a criminal defendant's Sixth Amendment rights.

2. Whether the Sixth Amendment and the "reliability test" of Dutton mandate consideration of the "crucial and devastating" nature of testimony offered under the co-conspirator exception to the hearsay rule.

3. Whether Dutton requires specific findings at trial regarding reliability of the hearsay declarant and the "crucial and devastating" nature of the statements being offered.

4. Whether the government, in a criminal case, must establish reliability of the declarant and his statements by a preponderance of the evidence or some other standard.

STATEMENT OF THE CASE

The tax investigation of Lefkowitz by Special Agents of the Intelligence Division of the Internal Revenue Service commenced on May 14, 1975. The course of that investigation, Commissioner summonses were served upon Lefkowitz and Sullivan--the secretary for several of Lefkowitz's corporations, a co-conspirator, and his girlfriend--with respect to the books and records of several corporations and entities, including N/U Rent a Car. From April of 1975 through June of 1976 defendant Babic, a former Special Agent of the Intelligence Division, was tax counsel and tax advisor to Lefkowitz and some of his entities. Lloyd Martin Fisher was the controller employed by Lefkowitz and the entities.

Negotiations were held with the Special Agents, with a view to supplying the information at a date subsequent to the return date of the summons itself. During the period of delay, Fisher rewrote the records, which were then submitted to the Internal Revenue Service. The original records were maintained at the corporate offices located in Los Angeles, California, and were subsequently moved to the home of Lefkowitz in Granada Hills, California. Information was later received by the Internal Revenue

Service that the records had been rewritten and the original records were possibly available. Search warrants, obtained for the corporate offices and the Lefkowitz residence, were executed on November 17 and 18, 1975, and the original records were seized by the Agents of the Internal Revenue Service.

It is clear that the records in this case were rewritten. As to defendant Babic, the ultimate issue is whether there is sufficient admissible evidence to establish beyond a reasonable doubt that Babic participated in the conspiracy to rewrite and falsify records and submit them to the Internal Revenue Service.

At trial, Sullivan was permitted, over objection, to testify as to statements from Babic to Lefkowitz concerning the destruction of records and the cover-up of the scheme. R.T. 136. None of the alleged statements of Babic were made in the presence of Sullivan and Lefkowitz did not testify.

That these statements were made by Lefkowitz to Sullivan is possible, indeed probable, in view of his (Lefkowitz's) need to assuage the fears of his girlfriend (Sullivan) and maintain her cooperation as a co-conspirator. What better way to accomplish this than by setting up an attorney, Babic, as a source of approval for the scheme.

Because of the nature of the balance of government witnesses at trial, Sullivan's testimony gained significance. Fisher relayed facts and circumstances which were as consistent with Babic's innocence as they were with guilt. Similarly, the Internal Revenue Service Agents could not confirm Babic's participation. In this sense, Sullivan's testimony, if believed, presented the most "crucial and devastating" kind of evidence against Babic.

The trial court convicted Babic of two counts and the decision was upheld in rather summary fashion by the Court of Appeals for the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

I

REFINEMENT OF THE DUTTON STANDARD IS NECESSARY TO INSURE A CRIMINAL DEFENDANT'S SIXTH AMENDMENT CONFRONTATION RIGHTS

In Dutton v. Evans, 400 U.S. 74 (1970) this Court addressed the issue left unanswered in Bruton v. United States, 391 U.S. 123 (1968): whether a statement admissible under the co-conspirator exception to the hearsay rule poses a threat to a criminal

defendant's confrontation right if the declarant does not testify. The plurality decision focused on three factors deemed by the Court to supplant the defendant's opportunity to confront the declarant. The factors include: reliability; the "crucial" nature of the statement, or its necessity to the proceedings; and the "devastating" nature of the statement, or its prejudice to the defendant. 400 U.S. 88-89.

Commentators, in general, feel that the time has come for this Court to refine its factor test. The Supreme Court, 1970 Term, 85 Harvard Law Review 3, 199. It is speculated that, in Dutton, this Court purposefully left the door wide open for interpretation and expansion by the circuit courts. Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harvard Law Review 1328, 1381. In the 10 years since the decision, few courts have accepted the invitation. Now is the time for review by this Court.

It has been asserted that a "due process" type balancing was intended by this Court. The more crucial a statement is to the prosecution's case, or the more devastating admission of the statement is to the defendant, the greater the standard of reliability required for admission of the statement. 85 Harvard Law Review 197.

If that is the case, the dissent position articulated by Justice Marshall gains new significance. It was his view that, post balancing, a co-conspirator's statement will almost always be prejudicial and that reliability can be assured only by cross-examination of the declarant. Simply, where the declarant does not testify these statements should be excluded regardless of necessity.

The impact of clarification on the case at bar is tremendous. Here, the most "crucial" and "devastating" testimony at trial came in the form of double hearsay--statements alleged to have been made by Babic to Lefkowitz and then repeated to Sullivan, the testifying co-conspirator. The impact of Sullivan's testimony was heightened by the absence of Lefkowitz for purposes of cross-examination.

By virtue of the fact that Lefkowitz did not take the stand, the reliability of his statements to Sullivan went untested. This fact becomes increasingly significant in light of Lefkowitz's high motive for fabrication. What better way to keep the support and ease the trepidations of a co-conspirator (Sullivan) than to sanction the conduct with imagined words from his attorney (Babic). Such motivation becomes even greater when you are trying to sanctify your acts in the eyes of your girlfriend in order to assure her continued cooperation and participation.

At the very least, evaluation of reliability must be accomplished on both levels of the hearsay statements admitted at trial through Sullivan. Not only must Sullivan's reliability be tested but the reliability of Lefkowitz must also be reviewed. To say that the evidence elicited in this manner was neither crucial nor devastating is to dramatically overstate the government's case.

For these reasons it becomes imperative to establish criteria to assure focus by the trial court on the reliability issue. That is, if the intent of the Court in Dutton is to safeguard Sixth Amendment rights through a careful analysis of reliability, clarification and refinement of the principles articulated must be given.

II

REFINEMENT OF THE DUTTON STANDARD IS NECESSARY TO RESOLVE DIVISION AMONG THE CIRCUIT COURTS

Attempts by circuit courts to define and implement the Dutton reliability standards have produced conflicting results. The leading Ninth Circuit decision in this area, Snow v. United States, 521 F2d 730 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976) all but ignores the "crucial

and devastating" aspect of the Dutton test. And, in spite of decisions in the Second, Fifth and Tenth Circuits, confusion abounds.

In the Second Circuit, for instance, Dutton requirements are reduced, in most cases, to finding the declaration to have been made in furtherance of the conspiracy, "[A]lthough the holding in Dutton is apparently not sui generis, its scope is uncertain in view of both the facts of the case and other recent decisions." United States v. Puco, 476 F2d 1099, 1103 (2nd Cir. 1973).

Contrary to the avoidance by the Ninth Circuit and confusion of the Second, the approach taken by the Fifth and Tenth circuits is enlightened. The Fifth Circuit--from which Dutton emanated--held that where hearing evidence is admitted the record must affirmatively show those inducia of the statement's reliability and trustworthiness which in turn serve as adequate substitutes for the right of cross-examination. Hoover v. Beto, 467 F2d 516, 533 (5th Cir. 1972).

When this issue was addressed by the Tenth Circuit in United States v. Roberts, 583 F2d 1173 (10th Cir. 1978) a "laundry list" approach was used. Unlike the Ninth Circuit in Snow, the Tenth Circuit highlights "crucial" and "devastating" criteria and also seems to require specific findings--a concept arguably at the heart of the Dutton mandate.

The only thing clear from Dutton and its progeny in the circuits is that nothing is clear. The circuit courts have been unable to piece together an integrated picture of this Court's concept of reliability.

In the case at bar, this confusion can be seen in the trial court's avoidance of the issue and the rather summary opinion issued by the Ninth Circuit. That Sullivan's testimony was both "crucial" to the government's case and "devastating" to Babic is easily seen in light of the weak and inconsistent testimony of Fisher.

Taken alone, Fisher's report of the sequence of events is as consistent with good practice by Babic, the attorney, as it is with culpability. Only after the introduction of Lefkowitz's statement as interpreted and related by Sullivan does Babic's role become tainted.

The Court should note that the re-written records did not exculpate, a fact which Babic, as a former Special Agent, would realize and which the laymen, Lefkowitz and Fisher, would not appreciate. The amateurish plan could not have been professionally orchestrated.

As an attorney, Babic must be responsible for advice given Lefkowitz, his client. It is wholly unfair and prejudicial, however, to permit fabrications by Lefkowitz to become primary

evidence against Babic without giving Babic an opportunity to expose his client's motivation and deceit through cross-examination.

III

THE STANDARD FOR DETERMINATION OF RELIABILITY MUST BE GREATER THAN MERE PREPONDERANCE OF THE EVIDENCE

As a preliminary hurdle to the admission of hearsay statements under the co-conspirator exception, the government must establish that a conspiracy existed, that the declarant made the statement during the conspiracy and that the statement was made in furtherance of the conspiracy. The import of the third requirement, furtherance, is to prevent admission of statements which satisfy the first two requirements but which are still unreliable. Obviously, however, the degree of protection afforded by these requirements depends entirely upon the standard by which the government must establish the preliminary facts.

If a "prima facie" standard is to be used guarantees of reliability provided by the requirements are too dilute. Several commentators have suggested that the preliminary determination be made at least at the preponderance level. Garland and Snow, The

Co-Conspirators Exception to the Hearsay Rule: Procedural Implementation and Confrontation Clause Requirements, 63 J. Crim. L.C. & P.S. 1, 8 (1972). [One authority even suggests the proper standard to be the level of criminal proof--beyond a reasonable doubt. Saltzburg, Standards of Proof and Preliminary Questions of Fact, 27 Stanford Law Review 271, 303 (1975)]. Under this standard, the judge would at least have to determine whether evidence establishing each of the preliminary facts was more convincing than evidence to the contrary.

By natural extension, it is arguable that the standard of review for the determination of reliability itself would be at least at the level of preponderance of the evidence. If this standard is less stringent than the one applied to the threshold factors, effective guarding of Sixth Amendment rights would be lost.

There is no indication in the trial court decision or in the opinion of the Ninth Circuit Court of Appeals that any such standard of review was utilized in this case. And, even if the preponderance standard had been used, it is probable that the government would be unable to meet its burden of proof regarding the reliability of Lefkowitz.

Any lesser consideration than that described above unduly burdens the attorney-client relationship by

forcing counsel to be almost paranoid about any contact with clients. Obviously this argument is not intended to suggest in any manner that attorneys should be able to knowingly participate in the transmittal of false evidence or any other improprieties. However, the process to determine when such improprieties have occurred must be embarked upon with strict security to protect and preserve the function of legal counsel which lies at the heart of due process.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 79-1231
v.	)	DC CR 78-758
EDWARD W. BABIC, Defendant-Appellant.	)	MEMORANDUM

Appeal from the United States District Court for the Central District of California

Before: DUNIWAY, CHOY AND SCHROEDER, Circuit Judges.

Babic was convicted, after a non-jury trial, of conspiracy to defraud the Internal Revenue Service (IRS), 18 U.S.C. § 371, and of aiding and assisting the preparation and presentation of fradulent documents to the IRS, 26 U.S.C. § 7206(2). We affirm.

Contentions on Appeal

Babic contends that (1) hearsay testimony linking him to the conspiracy was improperly admitted under Fed. R. Evid. 801(d)(2)(E) because (a) there

was no independent proof of the conspiracy, and (b) the hearsay statements were not made in furtherance of the conspiracy; (2) his Sixth Amendment right of confrontation was denied because the hearsay declarant was not available for cross-examination; and (3) excluding the hearsay testimony which the court had admitted, there was insufficient evidence to convict him of conspiracy.

We reject the first two contentions, and thus need not reach the third.

Admission of the Hearsay Testimony

Invocation of Fed. R. Evid. 801 (d)(2)(E) requires (1) independent evidence sufficient to support a finding of the existence of a conspiracy, and (2) evidence of at least a slight connection between the defendant and the conspiracy. E.g., United States v. Testa, 548 F.2d 847, 853 (9th Cir. 1977); see United States v. Dunn, 564 F.2d 348, 356-57 (9th Cir. 1977). Once these prerequisites are met, out-of-court statements by co-conspirators are admissible if they were made in furtherance of the conspiracy. See United States v. Eubanks, 591 F.2d 513, 519-20 (9th Cir. 1979).

The independent evidence sufficient to support a finding of the conspiracy need not be direct evidence; the conspiracy may be inferred from circumstantial evidence. E.g. United States v. Turner, 528 F.2d 143, 162 (9th Cir.),

cert. denied, 423 U.S. 996 (1975). Here, there was overwhelming evidence establishing a conspiracy, including direct and mutually supporting evidence from several witnesses, and indirect evidence in the form of IRS records. Babic's attack on the credibility of certain of these witnesses is out of place here. It is for the trial court alone to determine witness credibility.

Viewing, as we must, the evidence in the light most favorable to the government, there was also non-hearsay evidence (for example, the direct testimony of the other conspirators) sufficient to establish at least a slight connection between Babic and the conspiracy.

The admitted out-of-court statements were in furtherance of the conspiracy: they were made by co-conspirator Lefkowitz to induce another (Sullivan) to join the conspiracy and to further the conspiratorial objectives. See United States v. Eubanks, 591 F.2d at 520.

Rule 801(d)(2)(E) was properly invoked, and the out-of-court statements were properly admitted.

Babic's Right of Confrontation

Babic charges a violation of his Sixth Amendment right because the declarant of the admitted out-of-court statements was not available for cross-examination. The test for such a violation is "whether, 'under the

circumstances, the unavailability of the declarant for cross-examination deprived the jury [or, as here, the judge,] of a satisfactory basis for evaluating the truth of the extra-judicial declarations.' (citation omitted)" United States v. Snow, 521 F.2d 730, 734 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976).

Four factors to be considered in this determination are (1) whether the declaration contained no assertion of past fact; (2) whether the declarant had personal knowledge of the identity and role of the participants in the crime; (3) whether the declarant was possibly relying on faulty recollection; and (4) whether the circumstances under which the statement was made provide reason to believe the declarant had misrepresented the defendant's involvement in the crime. Id., citing Dutton v. Evans, 400 U.S. 74, 88-89 (1970) (plurality opinion).

Here, the declarant was the organizer and "hub" of this "wheel-type" conspiracy, and knew better than anyone Babic's involvement therein; the declarations, being of contemporaneous facts, do not suggest faulty recollection on the part of the declarant; and the circumstances under which the declarations were made do not provide any particular reason to doubt the declarant's veracity.

Because the challenged evidence implicating Babic in the conspiracy was properly admitted, we need not reach Babic's contention that, without it, the evidence is insufficient.

AFFIRMED.